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BANK ISLAM MALAYSIA BHD

v.

MUSTAFFAR YACOB & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[SUIT NO: D-22A-515-2011]
5 JULY 2012

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CONTRACT: *Oral agreement - Proof of - Claim for monies owing under banking facilities - Representation by plaintiff - Whether parties reached oral agreement to modify written agreement - Whether s. 92 Evidence Act 1950 applicable*

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The plaintiff claimed for monies owing under various banking facilities it had granted to a company ('the company') in which the defendants were directors. The defendants had personally guaranteed the repayment of the facilities and were sued in that capacity. The defendants contended that when the company went into financial difficulties and was unable to repay the facilities, the plaintiff through certain of its officers had

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represented to the second defendant that if the defendants were able to secure a 'white knight' to take over and complete the project for which the facilities were granted, the company and the defendants would be released from their respective obligations under the facilities agreement ('the agreement') and the guarantee. The defendants claimed that they did secure a 'white knight' agreeable to the plaintiff, yet, when the company defaulted, the plaintiff terminated the agreement and sued them for the amounts outstanding thereunder.

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Held (allowing claim with costs):

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(1) There was nothing to show any representation was made by the plaintiff to the defendants that if they secured a 'white knight' to take over and complete the project, the company and the defendants would be released from their respective obligations. The take-over and revival of the project was only with regard to the redemption of the property and did not concern the discharge of the defendants'

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liabilities. (paras 31 & 32)

(2) The defendants' evidence, taken in sum, was insufficient to warrant an inference that the parties had reached an oral agreement to modify the guarantee agreement. Further, by seeking to adduce

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evidence of an alleged representation to contradict, vary, add or subtract from the guarantee agreement(s), the defendants had fallen foul of the rule against parole evidence and s. 92 of the Evidence Act 1950. (paras 28 & 34)

(3) The defendants could not renege on their obligations to pay the outstanding amount under the guarantee agreement(s) on the pretext there was an oral collateral agreement which co-existed with the written agreement(s). Their argument that the collateral agreement allowing for the discharge of their obligations could stand together with the written agreement(s) failed as it clearly contradicted the terms of the guarantee agreement(s) which stated that it was a continuing guarantee. (paras 33 & 36)

(4) The letter of guarantee stated that the plaintiff did not have to proceed against, or exhaust whatever remedy it had, against the company. This was because cl. 2 of the guarantee provided that the guarantors jointly and severally guaranteed as principal debtors, and not only as sureties, to the plaintiff. (para 40)

Case(s) referred to:

Bank Bumiputra (M) Bhd v. Esah Abdul Ghani [1985] 2 CLJ 409; [1985] CLJ (Rep) 41 SC ***(refd)***

Dato' Dr Zambry Abd Kadir v. Dato' Seri Ir Hj Mohamad Nizar Jamaluddin; Attorney General of Malaysia (Interverner) [2009] 5 CLJ 265 CA ***(refd)***

Gek Lau Choon Theatrical Company v. Hu Kiang Yan [1936] 1 LNS 16 HC ***(refd)***

Hoyt's Proprietary Ltd v. Spencer [1919] 27 CLR 133 ***(refd)***

Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd [1993] 1 LNS 96 HC ***(refd)***

Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor [1995] 3 CLJ 70 HC ***(refd)***

Samaworld Asia Bhd & Anor v. RHB Bank Bhd [2008] 6 CLJ 44 CA ***(refd)***

Synn Lee & Co Ltd v. Bank of China [1962] 1 LNS 189 HC ***(refd)***

Usahatek Sdn Bhd v. Asia Insurance (M) Bhd; Palaniappan Sinnapan (third party) [2010] 1 LNS 670 HC ***(refd)***

Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh [2009] 6 CLJ 371 HC ***(not foll)***

Legislation referred to:

Companies Act 1965, s. 176

Evidence Act 1950, ss. 92, 114(g)

For the plaintiff - Syed Fadzil Alhabshi; M/s Sidek Teoh Wong & Dennis

For the defendants - Atma Singh Veriah (DR John with him); M/s Atma Singh Veriah & Co

Reported by Ashok Kumar

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JUDGMENT

Mohd Zawawi Salleh J:

Plaintiff's Claim

B **[1]** In this suit, the plaintiff is claiming against the defendants for:

(a) the outstanding amount of RM8,943,080.93 for Islamic Banking Facilities, known as Istisna Facility, Bank Guarantee Facility, Cash Note Facility and Additional Istisna' Facility;

C (b) *ta'widh* at the rate of 1% per annum on the outstanding amount from 13 April 2011 until full realization; and

(c) costs.

[2] After a full trial, the court allowed the plaintiff's claim with costs D fixed at RM30,000.

Background Of The Case

[3] The circumstances out of which this claim arose can be shortly stated as follows:

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(a) The plaintiff is a bank and carries on its business at 25 Floor, Menara TH Perdana, Jalan Sultan Ismail, Kuala Lumpur. The defendants were at material times the Directors of a company known as Khidmat Makmur Sdn Bhd (wound up on 12 February F 2010 at the High Court of Malaya at Shah Alam) ("the company").

(b) By a letter of offer dated 6 June 2002 ("the first letter of offer") and upon the company's application, the plaintiff had granted to the Company Istisna' Facility of RM7,500,000, Bank Guarantee of RM7,541,000 and Cash Note Facility of RM1,352,000 ("the said G facilities") subject to the terms and conditions that the customer and the defendants are fully aware of.

(c) Details of the Istisna' Facility are as follows:

H (i) Selling Price: RM9,056,086.80;

(ii) Period of Payment: 36 months; and

(iii) Mode of payment are as follows:

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No. of Months	Installment Amount (RM)	No. of Installments	Total (RM)
1 – 12	RM 62,500.00	12	RM 750,000.00
13 – 36	RM 346,080.95	24	RM8,306,086.60

(d) Bank Guarantee was given for period of 24 months only and subject to the terms and conditions stipulated in the letter of offer.

(e) Details for Cash Note Facility are as follows:

(i) Selling Price: RM1,632,510.56;

(ii) Period of payment: 36 months; and

(iii) Mode of payment are as follows:

No. of Months	Installment Amount (RM)	No. of Installments	Total (RM)
1 – 12	RM 11,266.67	12	RM 135,200.04
13 – 36	RM 62,387.94	24	RM1,497,310.56

(f) By a letter of offer dated 16 September 2002 ("the second letter of offer"), term of Cash Note Facility has been amended with the company's consent.

(g) The Cash Note Facility has been executed *vide Qard Al-Hasan* agreement ("*Qard Al-Hasan* agreement"), Asset Sale Agreement ("ASA") and Asset Purchase Agreement ("PA"), all dated 9 October 2002.

(h) *Vide* a letter of guarantee dated 9 October 2002 ("the first guarantee"), the defendants have agreed to jointly and severally guaranteed the repayment of all the sum due by the company to the plaintiff for the Cash Note Facility.

(i) By a letter of offer dated 6 May 2004 ("the third letter of offer") and upon company's application, plaintiff had granted to the company additional *Istisna'* Facility of RM10,000,000 ("Additional *Istisna'* Facility") subject to the terms and conditions that the defendants are fully aware of.

(j) Details of the Additional *Istisna'* Facility are as follows:

(i) Selling Price: RM12,850,000.00;

(ii) Period of payment: 36 months; and

(iii) Mode of payment are as follows:

No. of Months	Installment Amount (RM)	No. of Installments	Total (RM)
1 – 35	RM 79,166.67	35	RM 2,770.833.45
36	RM10,079,166.55	1	RM10,079,166.55
	Total		RM12,850,000.00

(k) The Additional *Istisna'* Facility has been executed *vide* Istisna' Sale Agreement ("ISA") and *Istisna'* Purchase Agreement ("IPA"), all dated 7 June 2004 (exh. "MJ-6").

(l) *Vide* a letter of guarantee dated 7 June 2004 ("the second letter of guarantee"), defendants have agreed to jointly and severally guaranteed the repayment of all the sum due by the company to the plaintiff for the Additional *Istisna'* Facility.

[4] The plaintiff alleges that the company and defendants have failed, refused and/or neglected to maintain the said Cash Note Facility and Additional *Istisna'* Facility by failure to make payment towards the aforesaid facilities.

[5] The plaintiff, through their solicitors, had issued letter of demand dated 16 March 2011 to the defendants to recall the aforesaid facilities and demand the whole outstanding sum due of RM8,915,678.37 as at 9 March 2011.

[6] However, the defendants still fail, refuse and/or neglect to pay the outstanding amount to the plaintiff.

[7] As at 12 April 2011, details of the outstanding amounts for Additional *Istisna'* Facility and Cash Note Facility are as follows:

Details

(a) Additional Istisna' Facility		
	(i) Selling Price	RM12,850,000.00
	(ii) Minus:Payment received	RM4,491,571.24
	(iii) Miscellaneous	RM80,372.67
	(iv) Ta'widh	RM356,544.17
	Total Outstanding	RM8,795,345.60
(b) Cash Note Facility		
	(i) Selling Price	RM1,632,510.60
	(ii) Minus: Payment received	RM1,484,895.27
	(iii) Miscellaneous	RM120.00
	Total Outstanding	RM147,735.33

[8] The plaintiff avers that as at the date of filing of statement of claim, the defendants are still owing to the plaintiff the outstanding sum of RM8,943,080.93 as at 12 April 2011.

Defendants' Case

[9] The defendants plead that when the company went into financial difficulties, the project stalled and the company was not able to pay the installments and was in breach of the facilities agreements, the plaintiff did not proceed to terminate the facilities and sell the securities. In fact, the plaintiff entered into discussions with the defendants and the company on how to revive the project.

[10] The defendants state that the plaintiff by its servant and/or agent, namely, Khairol Kamaruddin, Head of Department Special Assets Recovery, Nurulzahar Ghazali and Said Mohd Jawahir proposed to the second defendant that if they secured a white knight to take over and complete the said project, the company and the defendants will be released from their respective obligations.

[11] The defendants did secure a white knight, namely, Semangat Ulung Sdn Bhd, to take over and revive the said project. The plaintiff accepted the said white knight.

[12] Pursuant thereto, the company entered into an agreement with the white knight dated 30 July 2008, known as the take over and Revival of Property Development Agreement, and under Cl. 2.1.9 of the said take over agreement, the plaintiff agreed to redeem the property for a sum not exceeding RM12,000,000.

[13] By an agreement dated 31 December 2008, the company and Majlis Bandaraya Shah Alam ("MBSA") entered into an agreement with the white knight known as the Revival of Property Development Agreement. Under the said agreement, the terms of the development were changed.

[14] Further, under both the aforesaid agreements, a condition precedent was that the sanction of the court pursuant to s. 176 of the Companies Act 1965 was to be obtained. Inspite of not having obtained the said sanction, the plaintiff allowed the white knight to take over and revive the project.

Issues To Be Determined By The Court

[15] During the trial, the issue between the parties crystalised around the following:

(a) whether representation was made by the plaintiff to the defendants that if the defendants secured a white knight to take over and complete the project, the company and the defendants will be released from their respective obligations under the facilities agreement;

A (b) whether the notice of demand and termination is valid;

(c) whether the plaintiff did temper two letters dated 18 February 2009 (P1) and 2 April 2009 (P2) respectively;

(d) whether the certificate of indebtedness (exh. "MJ-9") contains
B manifest errors;

(e) whether the plaintiff's claim for *tawi'dh* is invalid, null and void; and

(f) whether s. 114(g) of the Evidence Act 1950 should be invoked against the plaintiff for failure to produce in court the minutes of
C meetings between the plaintiff and the second defendant regarding an internal valuation made for Lot 509.

Defendants' Submissions

D *Issue (a)*

[16] The defendants contend that Encik Nurulzahar Ghazali (PW1) and Encik Said Mohd Jawahir (PW2) did make representations to the second defendant that if he secured a white knight to take over and complete the said project, the company and the defendant will be released from
E their respective obligations ("the representations"). According to the defendants, there are substantial evidence to support such a conclusion. PW2 admitted that the second defendant, upon receipt of the letter of termination and demand, came to see him. PW2 then introduced the second defendant to Puan Mahani Jamaludin (PW3), as the file had been
F transferred to her.

[17] The defendants posit that in addition to the above evidence, there was an admission by PW1 that he was aware that the second defendant in his affidavit in reply (in opposition to the plaintiff's application for summary judgment) had stated that certain representations were made
G by three persons, namely, himself, Encik Said Mohd Jawahir (PW2) and Encik Khairol Kamaruddin. All three persons mentioned in the affidavit in reply had not filed any affidavit to refute the allegation and agreed that was the first opportunity available for all of them to refute such an allegation.

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[18] In his evidence, the second respondent has stated very clearly that after the project stopped towards the end of 2005, he met PW2 and PW2 told him to get a white knight to complete the project and in that event, the defendants and the company will be released from their
I obligations and guarantee (please see Q & A at p. 59). Subsequently, the second respondent met Encik Khairol Kamaruddin, PW1 and PW2. In the course of the discussion, all three of them made representations to him that the defendant will be released together with the company of their obligations if he obtained a white knight (please see Q & A at pp. 59 and 60 of the notes of proceedings).

[19] The defendants argue that no demand letter was sent to the defendants and the company prior to the issuance of the letter of demand and terminations dated 11 March 2011; ie, five years and three months after the alleged default and breach. This clearly shows that because of the negotiations that were going on, no steps were taken whatsoever by the plaintiff to recover the money due from the company and defendants.

[20] Further, the plaintiff's letter dated 2 April 2009 to the white knight (please see p. 239 of CABD), wherein the plaintiff stated at para. 3 as follows:

> *Notwithstanding the above, we reserve the right to proceed at any time and without further notice, with any or all of the remedies available to us under the financing and security agreement(s) if the Revival Plan is not successful.* (emphasis added)

[21] The defendants argue that this is a clear admission on the part of the plaintiff that if the Revival Plan was successful, the plaintiff will not proceed under the Financing and Security Agreement(s).

Court's Findings

[22] It would appear that there is a conflict between the evidence of the second defendant (DW1), PW1 and PW2 in respect of the representations. PW1, in his witness statement at Q & A No. 33, 34 and 35, denied that plaintiff has made representations that the company and the defendants will be released from their obligations if the defendants secured a white knight to take over and complete the project. PW1 statement was corroborated by PW2 witness statement at Q & A 7, 8 and 9. The second defendant (DW1) himself confirmed that there was no formal letter made to the plaintiff to discuss about the discharged of their liabilities as the guarantors (see p. 61, notes of proceedings). DW1 also confirmed that the plaintiff never issue any letter saying that the defendants have been discharged from their liabilities as the guarantors.

[23] In the case of *Dato' Dr Zambry Abd Kadir v. Dato' Seri Ir Hj Mohamad Nizar Jamaluddin; Attorney General of Malaysia (Interverner)* [2009] 5 CLJ 265 CA, Raus Shariff JCA (as he then was) had this to say:

> [21] It is trite law that when there is a conflict between the evidence of two witnesses, the court would resolve the conflict by relying on the uncontroverted documentary evidence which is neutral in nature. In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119 FC, at p. 229, Chang Min Tat FJ has this to say:
>
> > For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable

A inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with the purpose of his own to serve and if it did not account for the statements in his documents and writing. Judicial reception of evidence requires that oral evidence be critically tested against the whole of the other evidence and the
B circumstances of the case. Plausibility should never be mistaken for veracity …

[22] In *Grace Shipping Inc & Anor v. CF Sharp & Co (Malaya) Pte Ltd* [1986] 1 LNS 60 PC, Lord Goff of Chiveley in delivering the judgment of the Privy Council, speaking on the same subject held
C that it is of crucial importance for judges to have regard to the contemporary documents and to the overall probabilities when facing the task of assessing the evidence of witnesses. (See also *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC, *Eastern & Oriental Hotel [1951] Sdn Bhd v. Ellarious George Fernandez & Anor* [1988] 1 LNS 161 SC; *Tan Sooi*
D *Shin v. Kow Kek Hing (1)* [1991] 3 CLJ 1895; [1991] 4 CLJ (Rep) 107 HC and *Kumagai Gumi Co Ltd v. Zenecon – Kumagi Sdn Bhd* [1994] 1 LNS 73 HC.

[24] In the present case, on the perusal of all the correspondences and
E documents that have been executed between the parties as well as the documents executed between the company and the white knight together with MBSA, the court finds that the discussion was about redemption of the secured property and do not expressly mentioned that the defendants will be released from their obligations. DW1 himself agrees
F that the agreement executed between the company and the white knight (Semangat Ulung Sdn Bhd) never provides for any clauses as to their liabilities with the plaintiff that they will be released and discharged. Further, DW1 also agrees that the plaintiff never a party to the revival project that been completed by the white knight.

G **[25]** DW1's allegation that there was such representation is clearly contradicted with the written agreement that he executed together with the first defendant, namely, the guarantee agreements, both dated 9 October 2002 and 7 June 2004, respectively. Clause 18(e) of the guarantee states that:

H No *amendment modification termination or waiver of any provision of this guarantee nor consent to any departure by the guarantors* therefrom *shall be effective unless the same shall be in writing and duly signed or executed by the bank* and then any such waiver or consent shall be effective only in the specific instance and for the specific purpose for which it was given …

I (emphasis added)

[26] The validity of cl. 18(e) of the guarantee is not the matter which is being put in issue here. What is questioned is the validity of the defendants' claim that a subsequent verbal agreement, by way of

representation, was agreed upon by the parties after the execution of the guarantee agreement(s) which substantially modified their earlier written agreement.

[27] What we have here are carefully drawn and comprehensive guarantee agreement(s) which squarely committed the defendants to guarantee the payment of all the sum due by the company to the plaintiff under the said facilities. This guarantee agreement(s) creates a strong barrier against a claim of subsequent modification. That barrier cannot be penetrated by a weak claim such as the one presented by the defendants.

[28] The court is of the considered opinion that the evidence of subsequent oral modification of the guarantee agreement(s), if any, must be of sufficient force to overcome the presumption that the complete agreement(s), which requires written consent to modification, expresses the intent of the parties. The court requires the proponent of an alleged oral modification to prove that the terms of the written agreement were altered by the oral agreement by more than a simple of preponderance of the evidence. The evidence of vague, indefinite, or ambiguous statements will not suffice. The court concludes that the defendants' evidence, taken in sum, is insufficient to warrant an inference that the parties had reached an oral agreement to modify the written agreement, ie, the guarantee agreement.

[29] The overall probabilities of the case also does not support the defendant's allegation. It is not in dispute that the facilities given involved such a huge amount and until and unless approval is given by the top management of the plaintiff, no bank officer would be authorized to give such representation. In this regard, the court agrees with the judgment of my learned sister, Rohana Yusuf J, in the case of *Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh* [2009] 6 CLJ 371 HC, when Her Ladyship said:

> (2) *The defendant owed the burden of proving that the representations and assurances had concluded an oral collateral agreement which co-existed with the written agreements. However, when viewed objectively in the context of a banking arrangement, the representations which were allegedly made to the defendant by the officers of the plaintiff were inherently incredible. No bank officer would be authorized to give such representations as were allegedly given by the plaintiff's representatives.* Further, it was wholly implausible that the defendant in his standing as a highly educated, experienced and prominent corporate figure, would have relied on such representations. *The alleged representations were clearly and extravagantly unusual for the plaintiff's officers to make. The defendant ought to have known that it obviously fell right outside the plaintiff's officers' authority or scope of employment to make such representations. Even if the alleged representations were in fact given, the defendant should have at the very*

A *least, referred to the plaintiff's top management or board of directors for their confirmation, instead of simply relying on such representations.* It would be wholly inconsistent with the conduct of an experienced businessman for the defendant to rely on the representations. (emphasis added)

B **[30]** The court is very much aware of the argument that corporate transaction would speedily come to a standstill when every person dealing with a corporation held duty – bound to disbelieve every act of its responsible officers, no matter how regular they should appear on their face. In passing upon the liability of a corporation/bank in cases of C this kind it is always well to keep in mind the situation as it presents itself to the third party with whom the agreement/contract is made. Naturally he can have little or no information as to what occurs in corporate meetings; and he must necessarily rely upon the external manifestation of corporate consent. The integrity of commercial transactions can only be maintained by holding the corporation/bank D strictly to the liability fixed upon by its agents in accordance with the law. It is familiar doctrine that if a corporation/bank knowingly permits one of its officers, or any other agent, to do acts within the scope of an apparent authority, and thus holds him out to the public as possessing power to do those acts, the corporation/bank will, as against E anyone who has in good faith dealt with the corporation/bank through such agent, be stopped from denying his authority.

[31] The above argument is not applicable here because the court has already concluded that there was no showing that the representation was F made by the plaintiff to the defendants that if the defendants secured white knight to take over and complete the project, the company and the defendants will be released from their respective obligations under the facilities agreements

[32] It is clear that the take over and revival project was only with G regards to the redemption of property and does not concern with the discharge of liabilities of the defendants. Dato' Lim Chee Khoon (PW4) confirmed that the main purpose of Property Development Agreement dated 31 December 2008 is only to revive the abandoned project and the said agreement was not intended for the white knight to take over H the liability of the company and their guarantors from the plaintiff (see pp. 52 and 53, notes of proceedings).

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[33] The defendants cannot renege on their obligations to pay the outstanding amount under the guarantee agreement(s) under the pretext that there was an oral collateral agreement which co-existed with written agreement(s). Obligations arising from the guarantee agreement(s) have the force of law between the contracting parties and should be complied with in good faith.

[34] Further, the defendants by seeking to adduce evidence of an alleged representation to contradict, vary, add or subtracts from the guarantee agreement(s) had fallen foul of the rule against parole evidence and s. 92 of the Evidence Act, 1950 (see *Samaworld Asia Bhd & Anor v. RHB Bank Bhd* [2008] 6 CLJ 44 CA; *Gek Lau Choon Theatrical Company v. Hu Kiang Yan* [1936] 1 LNS 16 HC; *Usahatek Sdn Bhd v. Asia Insurance (M) Bhd; Palaniappan Sinnapan (third party)* [2010] 1 LNS 670 HC; *Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd* [1993] 1 LNS 96 HC).

[35] A collateral agreement cannot be established where it is inconsistent with or contradict the written agreement. In the Australian case of *Hoyt's Proprietary Ltd v. Spencer* [1919], 27 CLR 133, Knox CJ said at p. 139:

> A distinct collateral agreement, whether oral or in writing, and whether prior to or contemporaneous with the main agreement, is valid and enforceable even though the main agreement be in writing, provided the two may consistently stand together so that the provisions of the main agreement remain in full force and effect notwithstanding the collateral agreement. This proposition is illustrated by the decisions in *Lindley v. Lacey* [1864], 7 CBNS 678, *Erskine v. Adeane* [1873], 8 Ch App 756, *De Lassalle v. Guildford*, [1901] 2 KB 215, *and other cases.*

[36] The defendants' argument that the collateral agreement allowing for the discharge of the their obligations could stand together with the written agreement must fail as it clearly contradicts the terms of the guarantee agreement(s) which states that it was a continuing guarantee.

Issue (b)

[37] The defendants contend that the letter of demand and termination is invalid, null and void. According to the defendants, when a company is wound up, it is necessary to send a notice to the official assignee.

[38] With respect, the contention is devoid of merit. Even though the company has been wound up, the plaintiff has the right to proceed with the legal action against the defendants based on the guarantee given by them.

[39] Clause 4(1) of the letter of guarantee agreement states that:

> The obligations of the guarantor hereunder shall be absolute, irrevocable, unconditional and continuing and in any and all circumstances shall not be prejudiced, released, discharged or otherwise affected by any one or more of the following (whether occurring with or without the consent of or notice to any person):
>
> (j) the insolvency winding up receivership administration official management reconstruction reorganization or amalgamation of the Customer.

[40] Further, the letter of guarantee of agreements also states that the plaintiff does not have to proceed against the customer; ie, the company or exhaust whatever remedy they have against the customer. This is because cl. 2 of the letter of guarantee agreements already provided that the guarantors will be jointly and severally guarantee as the Principle Debtor and not only as sureties to the plaintiff. In the case of *Bank Bumiputra (M) Bhd v. Esah Abdul Ghani* [1985] 2 CLJ 409; [1985] CLJ (Rep) 41 SC, the Supreme Court held that:

> [3] The respondent, as guarantor, has no special right to demand that the appellant, as creditor, should call upon the principal debtor to pay off the debt before asking the respondent to pay pursuant to the guarantee.

Issue (c)

[41] The defendants allege that the plaintiff has concocted "the c.c copy" of the two letters dated 10 February 2009 and 2 April 2009 respectively. The defendants argue that these two letters were intended by the plaintiff to show that the plaintiff had at all material times kept the company and the defendants informed of the status of the matter; to refute the defendants' evidence that the aforesaid representations were made; and to refute the company and the defendants were not informed of the dealings between the plaintiff and the white knight.

[42] The defendants categorically denied that these letter were ever copied to them. Further, the plaintiff has produced no evidence of "c.c copy" to the company and the defendants. The defendants lodged a police report on the tempering of the said letter, vide PJ Report No. SEK–15/005654 dated 13 March 2012.

[43] The two letters dated 18 February 2009 and 2 April 2009 were brought to the court and tendered as P7 and P8.

[44] On the available evidence, the court agrees with the submissions of learned counsel for the plaintiff that the "c.c copy" already existed at the time the plaintiff sent those letters to the white knight. In fact, when the white knight produced those letters to the court, "the c.c copy" was already there and "the c.c copy" was in fact sent to the defendants.

[45] It is a basic rule in evidence that the burden of proof is on the part of the party who makes the allegations–*ei incumbit probatio, qui dicit, non qui negat*. If the defendants allege that the plaintiff has concocted "the c.c copy" of the two letters, the defendants must prove their allegation by competent evidence, relying on the strength of their evidence and not upon the weakness of that their opponents.

[46] Were the defendants able to discharge their burden of proof on concoction issue? The answer is a categorical no.

[47] It is instructive to note that in terms of the content of these letters, they are identical even though the pagination is different.

Issue (d)

[48] On the issue that the statement of account at p. 241 – 241 (P4) and p. 243 - 241 (P5), ikatan dokumen bersama, bundle B, does not consistent with the statement of account that has been exhibited during the plaintiff's application of summary judgment, the court is of the considered opinion that the different does not in any way affected the calculation of the standing amount sum that the plaintiff claims against the defendants. In addition, calculation in the statement of account also does not affect certificate of indebtedness that was produced by the plaintiff. Even though the calculation of the miscellaneous costs in the statement of account has been divided into four but the total miscellaneous costs when added is the same as in the certificate of indebtedness.

Issue (e)

[49] The defendants submit that under cl. 8.25 of the *istisna'* sale agreement dated 7 June 2004, the plaintiff would have to give a notice to the customer before the imposition of *ta'widh*. It is argued that no such notice was given to the company and defendants in this instant case.

[50] The short answer to this submission is that the notice of demand and termination that has been sent to the defendants is in itself a good notice because the plaintiff also claims for *ta'widh*.

[51] The plaintiff is entitled to claim for *ta'widh* based on the security documents that has been executed. Under cl. 8.25 of the *Istisna'* sale agreement dated 7 June 2004, the agreement clearly provides that the plaintiff entitled to claim for *ta'widh* on the amount due and outstanding accrued from the date due to the date of settlement. The clause states that:

> 8.25 Ta'widh (Compensation)
>
> Without prejudice to any other right, remedy or privilege of the bank set out in this agreement, the customer shall pay any sum of money whatsoever at one per centum (1%) per annum on the amount due and outstanding accrued from the date due to the date of settlement thereof or such other amount as the Syariah Advisory Council of Bank Negara Malaysia or the bank may permit from time to time, such compensation to be paid immediately upon notice by the bank.

[52] The Syariah Advisory Council on its 4th meeting held on 14 February 1998 resolved that ta'widh can be imposed on the defaulting customer who fails to meet his obligation to pay the financing based on the following conditions:

(i) the amount of *ta'widh* cannot exceed the actual loss suffered by the financier;

(ii) the determination of compensation is made by a third party, that is Bank Negara Malaysia; and

(iii) the default or delay of payment is due to negligence on the part of the customer.

[53] In this instant case, the rate of the *ta'widh* imposed by the plaintiff is based on Islamic Inter Bank Money Market rate since the tenor of the facility has expired. Therefore, the plaintiff is entitled to the *ta'widh* at the Islamic Inter Bank Money Market rate based on the cl. 8.25 of the *istisna'* sale agreement dated 7 June 2004.

Issue (f)

[54] The defendants submit that the court should invoke the presumption under s. 114(g) of the Evidence Act, 1950 on the grounds that certain documents were not produced during the trial and the fact that the plaintiff did not call Encik Khairol Kamaruddin as a witness.

[55] Concerning the issue that the defendants' argument that the plaintiff never produced the minutes of the meeting between PW1 and DW1, there was no application by the defendants before the court that

such minutes be produced during the trial. This was never done when the plaintiff closed its case and also when the defendants closed their case. If the defendants really want the plaintiff to produce the said notes, they can always ask the court to order the plaintiff to produce the same.

[56] Concerning the failure of the plaintiff to call Encik Khairol Kamarudin as a witness, the plaintiff submits that even Encik Khairol was called as a witness, his statement would have been the same as PW1 and PW2 that there was no representation made to the defendants. Furthermore, Encik Khairol was not involved in the negotiation until the end since he was then transferred to another department when the negotiation was still in progress and not concluded yet at that time. PW1 and PW2 were more involved and had been in the negotiations from the beginning to the end.

[57] In the case of *Synn Lee & Co Ltd v. Bank of China* [1962] 1 LNS 189 HC, the court, when decided that s. 114(g) does not apply, held that:

> Again, when the vouchers were first mentioned, which was towards the end of the trial, counsel for the bank professed anxiety to obtain them but this was opposed by counsel for the appellant company. *In all the circumstances I do not think the appellant company have any cause for complaint nor do I think were they entitled at the trial to rely in any way on the non-production of the vouchers*. Whether or not they could have obtained discovery of them in the course of the interlocutory proceedings may well be a question and on the material before us it would be unsafe to express any very definite opinion regarding that question. The fact remains, ever, that at the trial counsel for the bank was prepared to produce the documents if he was given the necessary adjournment and it was counsel for the appellant company who objected to this course and thus in effect resisted the production.
>
> Before departing from the case I would quote the following passage from the judgment of the Privy Council in the case of *Bilas Kunwar v. Desraj Ranjit Singh 42 1A 202 206 AIR 1915 PC 96 ILR 37 All 557:*
>
> It is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If the fails so to do, neither he nor the court at his suggestion is entitled to draw any inference as to the contents of any such documents.

[58] Further, in the case of *Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor* [1995] 3 CLJ 70 HC, the High Court held that:

> (1) Although s. 114 of the Evidence Act 1950 grants the court the discretion to presume the existence of any fact which it thinks likely to have happened, the discretion must be exercised judiciously and not arbitrarily. There must be a proper basis for arriving at such a presumption, ie, the connection between the evidence tendered and the presumption relied on must not be too remote, too uncertain or offend any legal principles.

[59] The court is aware of the proposition that unexplained failure of a party to give evidence or to call a material witness may lead in appropriate circumstances to an inference that the uncalled evidence would not have assisted that party's case. However the principle has no application where the absence of the witness is satisfactorily explained.

[60] The explanation given here was not one that was obviously incredulous. Encik Khairol was not involved in the negotiation until the end. PW1 and PW2 were more relevant witnesses in this case.

Conclusion

[61] For all the reasons stated above, the court is of the considered opinion that the plaintiff on the balance of probabilities has proved that the defendants are liable to pay the amount outstanding as claimed by the plaintiff in the statement of claim.

[62] Therefore, the plaintiff's claim is allowed with costs fixed at RM30,000.